BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAUL MORALES CHAVARIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,012,527
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
FIDELITY & GUARANTY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the April 22, 2005, Award entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on July 27, 2005.

APPEARANCES

Steve Brooks of Liberal, Kansas, appeared for claimant. Shirla R. McQueen of Liberal, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an August 8, 2003, work-related accident. In the April 22, 2005, Award, Judge Fuller found claimant sustained a six percent whole person functional impairment for bilateral upper extremity injuries. The Judge also found respondent terminated claimant for cause and, therefore, the Judge limited claimant's permanent partial general disability benefits to his six percent functional impairment rating.

Claimant contends Judge Fuller erred. Claimant argues he is entitled to receive benefits for a work disability (a permanent partial general disability greater than the

functional impairment rating) based upon his loss of wages and loss of former work tasks. Accordingly, claimant requests the Board to modify the April 22, 2005, Award.

Conversely, respondent contends the Judge appropriately limited claimant's permanent disability benefits to his whole person functional impairment rating. In the alternative, respondent maintains claimant sustained a 10.5 percent task loss and a 55 percent wage loss for a work disability of 32.75 percent.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

While working in respondent's meat-processing plant, claimant sustained repetitive trauma injuries to both upper extremities. The parties stipulated August 8, 2003, should be considered the date of accident for these injuries.

In January 2004, claimant saw Dr. Pedro A. Murati, who diagnosed bilateral carpal tunnel syndrome and, therefore, recommended that claimant see a specialist to determine if surgery was appropriate. Dr. Murati also recommended work restrictions for claimant. But respondent could not accommodate those restrictions. Accordingly, on March 11, 2004, respondent placed claimant on a leave of absence through April 6, 2004. At that time, respondent also required claimant to turn in his equipment.

But when claimant decided he did not want to pursue surgery, the parties agreed to an order that claimant be evaluated by Dr. C. Reiff Brown. The appointment with Dr. Brown was scheduled for April 6, 2004.

Claimant met with Dr. Brown on the appointed date. At the conclusion of the examination, Dr. Brown prepared respondent's Medical Report form, which contained a section for medical restrictions. In that section, the doctor noted "[p]ermanent restrictions by report."[1] Claimant took that document to his attorney.

The parties stipulated they did not receive Dr. Brown's report, which set forth claimant's medical restrictions, until April 19 or 20, 2004. On April 21, 2004, respondent terminated claimant for failing to report to respondent before his leave of absence expired.

[1] R.H. Trans., Cl. Ex. 2.

Respondent was aware claimant was represented by counsel in this claim. Respondent, however, made no effort to contact claimant's counsel before the company terminated claimant.

When claimant was placed on leave, respondent requested claimant to sign a form entitled Request for Leave of Absence. But claimant refused to sign the form as he was not requesting a leave of absence. That form indicates claimant was being placed on "Workers Comp" and "FMLA" leave. The form also states, in part:

> 5. All employees are required to contact the company prior to expiration of leave period.
>
> 6. Failure to comply with the requirements set forth above may result in discharge.[2]

Respondent's personnel director, George Hall, testified he told claimant to report back to the plant before the leave expired. Moreover, in addition to the leave request form, respondent also gave claimant a two-page document written in Spanish, which Mr. Hall, claimant, and an interpreter reviewed together and discussed. According to Mr. Hall, that document also directed claimant to report to respondent's plant following Dr. Brown's appointment.

On the other hand, claimant's testimony regarding his understanding of the leave of absence is somewhat inconsistent. Claimant initially testified he thought he had been laid off on March 11, 2004, and that he did not understand he was required to report to the plant immediately following his April 6, 2004, appointment with Dr. Brown.

> Q. (Mr. Brooks) Now, on the second page, Raul -- Raul, look at the second page. It says something about 3-11-04 and 4-6-04. Did you understand you were supposed to come back to the plant that day?
>
> A. (Claimant) No, because they told me they had -- they no longer had a job for me because of my restrictions.
>
> Q. The importance of that day is the day you saw Dr. Brown; correct?
>
> A. When I went to Dr. Brown, I came back and I brought the papers back to my lawyer, because when they laid me off I told them at the personnel office that I knew that this was a layoff notice and I told them that if they needed to notify me of something that they would notify me through my lawyer.[3]

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[2] *Id.*, Cl. Ex. 1.

[3] *Id.* at 13-14.

Claimant also testified that on March 11, 2004, he was told he was being laid off. Moreover, he initially denied he was told he would be on leave of absence from March 11 through April 6, 2004.[4] But claimant later contradicted that testimony as he acknowledged he was told his leave expired on April 6, 2004, and that he was told he was required to contact the company before the leave expired.

> Q. (Ms. McQueen) Sir, Claimant's Exhibit 1, which you've seen when you were out at National Beef says that your leave expires on April 6, 2004, doesn't it?
>
> A. (Claimant) That's what they told me.
>
> . . . .
>
> Q. And the document also says that you're required to contact the company prior to the expiration of your leave period, doesn't it?
>
> A. They told me that on the paper it said that.
>
> Q. Okay. And by "they" told you that, you mean the people at National Beef? Mr. George -- Mr. Hall?
>
> A. Yes.
>
> Q. So Mr. Hall told you that you had to come -- come back to the plant before your leave expired; is that your testimony?
>
> A. They told me to call in.
>
> Q. Okay. Well, you said a minute ago that that's what they told you, that you were to report back in before your leave expired. Now you're saying they told you to call in. Which was it?
>
> A. That I would tell them about my restrictions when I would go to the doctor.
>
> . . . .
>
> Q. Why didn't you come back to the plant after you saw Dr. Brown?
>
> A. Because they told me that they no longer had a job for me because of my restrictions.

[4] *Id.* at 21-22.

Q. But, Mr. Chavarin, you testified a moment ago that Mr. Hall told you to contact National Beef after you'd seen Dr. Brown.

A. To tell him about my restrictions.

Q. But you were told to contact National Beef after you saw Dr. Brown, weren't you?

Mr. Brooks: If you remember.

A. Yes.[5]

But on redirect examination, claimant again testified he did not understand he was required to report to respondent's plant after seeing Dr. Brown.

Q. (Mr. Brooks) Raul, did you understand that you were supposed to go back to National Beef and see them after you saw Dr. Brown? "Yes" or "no"?

A. (Claimant) No.[6]

And on additional cross-examination, claimant again linked Dr. Brown's opinions regarding the appropriate work restrictions to returning to the plant.

Q. (Ms. McQueen) Well, Mr. Chavarin, when Mr. Hall told you to come back and see -- to contact National Beef after you saw Dr. Brown, what did you think that meant?

A. (Claimant) That I would let them know with my restrictions that the doctor would give me.

Q. So you did know and you understood that you were supposed to tell National Beef about your appointment with Dr. Brown?

A. To let them know about the restrictions.

Q. Okay. And you didn't do that, did you?

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[5] *Id.* at 24-26.

[6] *Id.* at 30.

> A. I did it through my lawyer. That my lawyer was going to let them know about my situation.[7]

Had claimant reported to respondent's plant immediately following his appointment with Dr. Brown on April 6, 2004, respondent would not have returned him to work as the company was awaiting claimant's medical restrictions. Selena Sena, respondent's workers compensation coordinator, testified that respondent would have merely extended claimant's leave of absence. Exhibit number 4 to Ms. Sena's deposition appears to show that Ms. Sena found (after reviewing Dr. Brown's recommended restrictions shortly before her deposition) 23 potential jobs at respondent's plant that claimant could perform.

After being terminated, claimant drew unemployment benefits and began to search for other employment. Following his termination, claimant unsuccessfully applied with respondent on three different occasions. Mr. Hall testified that he is a member of the committee that considered whether to bring claimant back to work and that the committee voted not to rehire claimant. Mr. Hall, however, does not recall why, although claimant's personnel file indicates he failed to follow a supervisor's instructions on two different occasions.

At the regular hearing, claimant introduced a list of approximately 116 contacts he made from March 24, 2004, through September 14, 2004, when he obtained a part-time job delivering pizzas. According to claimant, he now works up to seven hours per day delivering pizzas and at the time of the regular hearing was earning $5.15 per hour and approximately $26 to $28 per day in tips. But delivering pizzas costs claimant $9 to $10 per day in gas that he pays from his tips.

The record is not entirely clear how many days per week claimant now works. But claimant's March 29, 2005, submission letter to the Judge indicates claimant works five days per week and sometimes six.

As indicated above, the parties agreed that Dr. Brown evaluate claimant for purposes of this claim. The doctor diagnosed mild carpal tunnel syndrome, which the doctor rated as comprising a six percent whole person functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The parties do not challenge that rating.

Dr. Brown reviewed a list of former work tasks prepared by claimant's vocational expert and indicated claimant had lost the ability to perform seven of the 12, or approximately 58 percent. That task list analyzed claimant's jobs with respondent, another

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[7] *Id.* at 30-31.

meat-packing company, two fruit and vegetable companies, two orchards, and a medical clinic. The doctor reviewed a second task list prepared by respondent's vocational expert, Karen C. Terrill, and indicated claimant had lost the ability to perform three of the 22 former work tasks, or approximately 14 percent. Ms. Terrill's task list also includes the tasks claimant performed as a physician.

The Board concludes Ms. Terrill's task list is somewhat more complete and, therefore, more accurate. Consequently, the Board finds claimant has lost the ability to perform approximately 14 percent of the work tasks that he performed in the 15 years before sustaining the bilateral upper extremity injuries that are the subject of this claim.

CONCLUSIONS OF LAW

Claimant has sustained simultaneous bilateral parallel upper extremity injuries that are not addressed in the schedule of K.S.A. 44-510d. Consequently, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e, which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-

[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

injury wage should be based upon the worker's ability to earn wages rather than actual wages when the worker, after recovering from the work injury, failed to make a good faith effort to find appropriate employment.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[10]

The Kansas Court of Appeals in *Watson*[11] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[12]

After either returning or continuing to work following an injury, a worker must also make a good faith effort to retain that employment or a wage will be imputed for purposes of the wage loss prong of the permanent partial general disability formula. Respondent argues claimant was terminated for violating company rules and, therefore, the company contends claimant is precluded from receiving an award for a work disability.

Respondent desires the Board to limit its inquiry into whether or not respondent terminated claimant for violating company rules. The Board, however, concludes the inquiry is more broad. The appropriate test is whether claimant made a good faith effort to retain his employment with respondent and, therefore, company policy is only one factor to be considered in that analysis. And whether an injured worker has made a good faith effort to retain post-injury employment is determined on a case-by-case basis. In short, good faith is a question of fact to be determined after carefully examining all the facts and circumstances.

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[10] *Id.* at 320.

[11] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[12] *Id.* at Syl. ¶ 4.

In addition, before the wage claimant could have earned with respondent but for his termination will be imputed to claimant as a post-injury wage, there must be a showing that respondent had appropriate work available and would have accommodated claimant's restrictions had he not been terminated for violating a company rule or policy. Furthermore, good faith is likewise required of a respondent in its dealings with a claimant.

Injured workers who are terminated for reasons other than their injuries are not necessarily precluded from receiving an award of permanent disability benefits for a work disability.[13]

When claimant was terminated, he was not working as respondent could not accommodate his work restrictions. And respondent would not accept claimant back to work without knowing his final medical restrictions. Respondent had knowledge of the April 6, 2004, appointment with Dr. Brown and also knew that Dr. Brown was to set claimant's work restrictions. Respondent also knew claimant was represented by an attorney in this claim. Moreover, claimant's testimony is uncontradicted that he requested the company to contact his attorney about returning to work.

Notwithstanding the parties' intentions, claimant's permanent work restrictions remained in question despite his April 6, 2004, meeting with Dr. Brown. Consequently, claimant's employment status also remained in limbo.

The record does not indicate claimant has refused to work or that he has attempted to manipulate his workers compensation claim. Conversely, following his being terminated, claimant has attempted to return to work for respondent on three different occasions. Moreover, although claimant's testimony is inconsistent, it does establish that claimant was confused as to whether he was to report to respondent's plant immediately following Dr. Brown's appointment when he did not have Dr. Brown's work restrictions. And, as indicated above, extending the leave of absence was the only thing that respondent would have done had claimant returned to the plant immediately following his appointment with Dr. Brown.

It is disconcerting that a simple telephone call to the parties' attorneys may have prevented a worker from losing his employment and prevented an employer from losing an experienced employee. The Workers Compensation Act requires good faith from both employees and employers.

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[13] *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800, *rev. denied* 276 Kan. 967 (2003); *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

Considering all the facts and circumstances, the Board concludes claimant did not fail to make a good faith effort to retain his employment with respondent. The Board likewise concludes claimant made a good faith effort to find appropriate work after respondent terminated him. Consequently, claimant's actual post-injury wages will be used to determine his wage loss. Thereafter, the wages that claimant is presently earning should be used for the wage loss prong of the permanent partial general disability formula.

As indicated above, claimant works around seven hours per day, sometimes working five days per week and sometimes six days per week. Multiplying seven hours by the hourly rate of $5.15 per hour yields $36.05 per day. Adding the $36.05 per day to $27 per day in tips produces $63.05 per day in gross earnings. Subtracting $9.50 per day for gas that claimant must pay out-of-pocket leaves claimant a net of $53.55 per day, or $294.53 per week (multiplying $53.55 per day by five and one-half days per week). Consequently, claimant has established a $294.53 post-injury wage for purposes of K.S.A. 44-510e.

The parties stipulated August 8, 2003, was the appropriate date of accident for this claim. The parties also stipulated claimant's average weekly wage for computing this award was $591.90 until April 21, 2004, when it increased to $614.47.

Following August 8, 2003, claimant continued to work for respondent, presumably earning his regular wages. Accordingly, claimant is entitled to receive permanent partial general disability benefits for his six percent whole person functional impairment rating until April 21, 2004. For that period, claimant's disability benefits are based upon the $591.90 average weekly wage.

But for the period commencing April 21, 2004, claimant has established a work disability. Averaging his 52 percent wage loss (comparing $294.53 to $614.47) with the 14 percent task loss creates a 33 percent permanent partial general disability.[14] The April 22, 2005, Award should be modified accordingly.

In the event claimant's earnings change, or in the event respondent accepts claimant back to work, the parties may request review and modification as provided by the Workers Compensation Act.

[14] Because of the statutory scheme of accelerated payout, claimant is entitled to the same number of weeks of benefits during the different post-injury periods whether that period is based upon claimant's latest average weekly wage and resulting 33 percent work disability or whether it is based upon each respective period's actual average weekly wage and resulting work disability.

AWARD

WHEREFORE, the Board modifies the April 22, 2005, Award entered by Judge Fuller.

Raul Morales Chavarin is granted compensation from National Beef Packing Company and its insurance carrier for an August 8, 2003, accident and resulting disability.

For the period ending April 20, 2004, based upon an average weekly wage of $591.90, Mr. Chavarin is entitled to receive 3.71 weeks of temporary total disability benefits at $394.62 per week, or $1,464.04, plus 24.90 weeks of permanent partial general disability benefits at $394.62 per week, or $9,826.04, for a six percent permanent partial general disability.

Commencing April 21, 2004, based upon an average weekly wage of $614.47, Mr. Chavarin is entitled to receive 112.05 weeks of permanent partial general disability benefits at $409.67 per week, or $45,903.52, for a 33 percent permanent partial general disability.

The total award is $57,193.60.

As of August 15, 2005, Mr. Chavarin is entitled to receive 3.71 weeks of temporary total disability compensation at $394.62 per week in the sum of $1,464.04, plus 24.90 weeks of permanent partial general disability compensation at $394.62 per week, or $9,826.04, plus 68.86 weeks of permanent partial general disability compensation at $409.67 per week in the sum of $28,209.88, for a total due and owing of $39,499.96, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $17,693.64 shall be paid at $409.67 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steve Brooks, Attorney for Claimant
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director